NAGAPPAN A/L KUPPUSAMY v. PUBLIC PROSECUTOR

[S.C. (Salleh Abas L.P., Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) 28 October 1987 & 29 February 1988]

[Kuala Lumpur – Supreme Court Criminal Reference No. 3 of 1986]

Criminal Law – Charge of cheating – Defence of accused – Whether there is burden on accused to prove facts upon which his defence is based – Duty of prosecution to prove case beyond reasonable doubt – Penal Code, s. 420.

Evidence – Burden on accused in criminal trial – Duty of prosecution to prove guilt of accused – Evidence Act 1950, ss. 101 & 105.

In this case, the applicant was charged for an offence under section 420 of the Penal Code. His defence was called and after hearing the defence, the learned magistrate held that a reasonable doubt had been created and she accordingly acquitted and discharged the applicant. The Public Prosecutor appealed. The learned judge of the High Court allowed the appeal and ordered a retrial. The following questions were then referred to the Supreme Court under section 66(1) of the Courts of Judicature Act 1964:

(a) Whether on a charge under section 420 of the Penal Code where an accused person is called upon to enter his defence there is in law a burden cast upon him to prove any of the facts upon which his defence is based.

(b) If the answer to question (a) is in the affirmative, then, to obtain an acquittal, whether in law it is incumbent upon an accused person to prove the facts upon which he relies on a balance of probabilities, or is it sufficient to raise a reasonable doubt.

Held: (1) to earn an acquittal in a criminal proceeding for an offence under section 420 of the Penal Code, an accused has only to cast a reasonable doubt on the prosecution case;

(2) the learned magistrate was perfectly entitled on the facts of the case to come to her conclusion at the end of the trial. The order for retrial should be set aside.

Cases referred to:

(1) *Jayasena* v. *The Queen* [1970] 1 All E.R. 219 (refd).
(2) *R.* v. *Carr-Briant* [1943] K.B. 607 (apprvd).
(3) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89 (apprvd).
(4) *Looi Wooi Saik* v. *Public Prosecutor* [1962] M.L.J. 337, 339 (consd).

SUPREME COURT.

Manjeet Singh for the applicant.

T.S. Sambanthamurthi (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the grounds of decision of the court): Two questions were posed to us under section 66(1) of the Courts of Judicature Act 1964 as follows:

(a) Whether on a charge under section 420 of the Penal Code where an accused person is called upon to enter his defence there is in law a burden cast upon him to prove any of the facts upon which his defence is based.

(b) If the answer to question (a) is in the affirmative, then, to obtain an acquittal, whether in law it is incumbent upon an accused person to prove the facts upon which he relies on a balance of probabilities, or is it sufficient to raise a reasonable doubt.

The applicant was originally charged in the Kajang Magistrate's Court for an offence under section 420 of the Penal Code. He claimed trial and the matter proceeded for several days. In the event, at the end of the prosecution case the learned magistrate ruled that a *prima facie* case had been established against the applicant on the amended charge and called upon the applicant to enter his defence.

Upon hearing the evidence for the defence, the learned magistrate held that a reasonable doubt had been created and on July 17, 1984, she accordingly acquitted and discharged the applicant. On July 25, 1984, the Public Prosecutor filed in a notice of appeal against the order of acquittal.

During the course of the hearing of the appeal, the learned judge stated that he was bound by the decision of the Privy Council in *Jayasena* v. *The Queen*[1] and that if an accused person wished the court to believe in the existence of a particular fact then the burden lies on him to prove it.

The learned judge thereupon allowed the appeal and ordered a retrial of the applicant before another magistrate. Thus the reference.

The evidence for the prosecution was based on the testimonies of three principal witnesses, PW1 and PW2 (the complainants) and PW3. In their evidence, they stated that they were businessmen and were friends and that PW1 and PW3 were nephew and uncle respectively. PW3 also admitted in his evidence that he had previous experience in land matters.

Briefly, the prosecution story was that the applicant and another person with the name of

Zuri (still at large) came to Pontian and informed PW1 that there was a piece of land for sale for $120,000. PW1 was also told that if he wanted to purchase the land, he should make a deposit of 10% of the purchase price. A total sum of $11,000 was paid to the said Zuri and $900 to the accused. Subsequently, PW1 came to Kajang to look for the accused with PW2 and another friend. PW1 then said that on seeing them the accused fled in his car. They gave chase and the accused drove straight into the Kajang police station where a report was later lodged by both parties.

The applicant gave evidence on oath and said that there was no land transaction at all as alleged by the prosecution. The money transaction was not for land but for the purchase of counterfeit money. The applicant said he merely witnessed the handing of the money to the said Zuri for the purchase of the counterfeit money. In his evidence, the applicant said that what was agreed was that the exchange rate would be $11,000 for $35,000 forged notes. A cautioned statement of the applicant was also tendered in evidence.

In her grounds of decision, the learned magistrate stated that at the close of the defence she found that the defence had cast a reasonable doubt on the prosecution case. She also made certain findings that:

(a) it would be difficult to believe there has been any land transaction as alleged by the complainants because there was a complete absence of evidence of any discussion on the nature of the land;

(b) there was surprisingly no evidence of any request for particulars of the land before payment of the deposit;

(c) PW2 and PW3, being experienced businessmen, while PW3 had been a land broker, could not have overlooked to ask for particulars of the land before making any commitment on the deal.

Apart from those grounds, it would appear that the following facts could not have been overlooked by the magistrate *viz.* the amount of money paid as deposit ($11,000) does not in fact constitute 10% of the alleged purchase price of $120,000. Indeed, according to the defence the arrangement was that $11,000 was the sum required to purchase $35,000 counterfeit money.

Finally, there is some consistency between the evidence of the applicant and the cautioned statement made by him.

In our view, the learned magistrate was perfectly entitled to come to her conclusion at the end of the trial. But what about the questions posed?

Here, we have to go back to first principles. In a criminal proceeding, the onus on the prosecution throughout is to prove beyond reasonable doubt. From the beginning to the end, the burden remains on the prosecution to prove the guilt of the accused. At the close of the whole case, the court has to consider all the evidence adduced by both the prosecution and the defence and has to be satisfied that the case has been proved beyond reasonable doubt.

In other words, at the close of the whole case, the court has to consider all the evidence before it whether they satisfy all the ingredients of the offence. If upon the whole evidence the court is left in a real state of doubt, the prosecution is said to have failed to satisfy the onus of proof which lies upon it.

How much evidence is to be adduced depends on the nature of the requirement. Where the burden is shifted to the defence by a statutory presumption, the test in *R.* v. *Carr Briant*[2] and adopted in *Public Prosecutor* v. *Yuvaraj*[3] would be applied as applied in civil proceedings, namely, on the balance of probabilities.

In *Jayasena*[1], the question before the Privy Council was whether the jury was rightly directed on the burden of proof on the issue of self-defence in a trial for murder. It dealt with the exercise of the right of self-defence or more appropriately called the right of private defence in the Penal Code which is an exception in the Penal Code.

In *Looi Wooi Saik* v. *Public Prosecutor*[4], the appellant was also convicted of murder under section 302 of the Penal Code and the only question in issue was whether by reason of provocation the killing amounted to something less than murder. The sole question before the Court of Appeal was the correctness of the judge's direction on provocation. The Privy Council in *Jayasena* did not seem to find complete favour with *Looi Wooi Saik* but we find the following observations of Thomson C.J. pertinent and relevant for our purpose. The learned Chief Justice pointed out that the general exceptions and special exceptions contained in the

Penal Code are specifically dealt with in section 105 of the Evidence Ordinance 1950 which reads as follows:

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances."

But section 105 should not be read in isolation but must be read in relation to the Ordinance as a whole. In particular, sections 101 and 102 provided in effect that in a criminal case it is for the prosecution to prove the guilt of the accused person. Thus in the words of Illustration (a) to section 101 of the Evidence Act:

"A. desires a court to give judgment that B. shall be punished for a crime which A. says B. has committed. A must prove that B. has committed the crime."

We accordingly answered the questions posed simply in the following terms. To earn an acquittal in a criminal proceeding for an offence under section 420 of the Penal Code, an accused has only to cast a reasonable doubt on the prosecution case.

We also set aside the order for retrial.

Order accordingly.

Solicitors: *Manjeet & Associates.*

CHE OMAR BIN CHE SOH v. PUBLIC PROSECUTOR

WAN JALIL BIN WAN ABDUL RAHMAN & ANOR v. PUBLIC PROSECUTOR

[S.C. (Salleh Abas L.P., Wan Suleiman, Seah, Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) 16 December 1987 & 29 February 1988]

[Kuala Lumpur – Supreme Court Criminal Appeals Nos. 28 and 29 of 1986]

Criminal Law – Mandatory death sentence for offence of trafficking in dangerous drugs and under Firearms (Increased Penalties) Act – Whether against injunctions of Islam and therefore void – No reliance can be placed on wording of Article 3 of Federal Constitution – Federal Constitution, Arts. 3, 4 & 162.

Constitutional Law – Provision that Islam is religion of Federation – Significance of – Provision relates only to rituals and ceremonies – Not much reliance can be placed on wording of Article 3 to sustain submission that the punishment of death for the offence of drug trafficking or any other offence will be void as being unconstitutional – Federal Constitution, Arts. 3, 4 & 162.

In this appeal, an additional ground of appeal sought to show that the mandatory death sentence for the offence of drug trafficking and for the offence under the Firearms (Increased Penalties) Act is against the injunctions of Islam and therefore unconstitutional and void.

Held: (1) the term "Islam" or "Islamic religion" in Article 3 of the Federal Constitution in the context means only such acts as relate to rituals and ceremonies;

(2) during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce and inheritance only. It is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word "Islam" in the context of Article 3;

(3) it should thus appear that not much reliance can be placed on the wording of Article 3 to sustain the submission that punishment of death for the offence of drug trafficking or any other offence will be void as being unconstitutional.

SUPREME COURT.

S. Sivasubramanian for the appellant in Criminal Appeal No. 28/86.

T Mura Raju for the first appellant in Criminal Appeal No. 29/86.

Ramdas Tikamdas for the second appellant in Criminal Appeal No. 29/86.

Mohamed Noor Haji Ahmad (Deputy Public Prosecutor); *Zaini Haji Abdul Rahman* (Deputy Public Prosecutor) with him for the respondent.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the grounds of decision of the court): The additional ground of appeal in Criminal Appeal Nos. 28 and 29 of 1986 seeks to show that a mandatory death sentence for the drug trafficking offence and for the offence under the Fire Arms (Increased Penalties) Act is against the injunctions of Islam and therefore void. It is argued that since Islam is the religion of the Federation (Article 3(1)), and since the Constitution is the supreme law of the Federation (Article 4(1)), the imposition of the death penalty on these offences, not being a *"huddud"* or *"qisas"* according to Islamic law, is contrary to Islamic injunction and is therefore unconstitutional.

The first point to consider here is the meaning which could be given to the expression "Islam" or "Islamic religion" in Article 3 of the Constitution. If the religion of Islam in the context